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A STRUGGLE FOR PERFECTION IN AN IMPERFECT WORLD: Dignity of the Individual, Incapacity for Self-Management, Rights, Duties and Conflicts of Interest

by

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INTRODUCTION

1 This paper addresses an interstate audience about large issues involved in, and consequentially upon, the incapacity of an individual for the making of decisions affecting his or her own affairs.

2 Those issues are sometimes discussed under the rubric of "elder law"; but that label does not do justice to young people who suffer incapacity in management of their affairs.

3 A more accurate label might be "estate management law"; but that focuses on the management of property (an "estate") and does not accommodate the law governing management of "the person" of an incapacitated person, often discussed by reference to the word "guardianship".

4 The word “guardianship” has a broader meaning than merely management of the person: eg, *Clay v Clay* (2001) 202 CLR 410 at [37]-[40]. In the abstract, it is broad enough to describe estate management. However, contemporary Australian usage generally confines its meaning to management of the person, in contrast to “financial management”.

5 The expression “succession law” captures a broad range of issues; but it does not cover the field. Questions of incapacity can arise in relation to *inter vivos* transactions well removed from contemplation of death or a general incapacity for self-management.

6 Although the expression “incapacity law” might cover a large part of the field that commonly needs to be traversed, it does not cover territory occupied by applications to a court for “family provision” relief after death.

7 Perhaps we should speak not of “elder law”, “estate management law”, “guardianship law” or “incapacity law”; but of “family management law”. That is because a key to an understanding, and correct application, of the law governing management of the person and estate of an incapable person is often to identify those who have an “interest” in the administration of an estate (a key factor in both probate and family provision litigation) or the full range of “family” (secularised as “significant others”) of an allegedly incapable person in protective proceedings. However, that expression does not sit comfortably with consideration of capacity in connection with a single transaction.

8 In the final analysis, any utility in a search for a comprehensive descriptive label may be in its forced recognition of the breadth of the issues that need to be addressed, not easily summarised in any single label.

9 The law generally proceeds on an assumption that each individual is autonomous and that he or she both can, and should, take care of himself or herself. Commonly this is expressed in terms of a “presumption in favour of sanity (capacity)”: eg, *Murphy v Doman* (2003) 58 NSWLR 51; [2003] NSWCA 249 at [36].

10 In a perfect world, such a presumption would not be necessary. However, experience teaches that, in the practical world, there is need of a presumption of sanity, a need to recognise that it is rebuttable and a need to understand what is required for its rebuttal. This must be done in the imperfect world in which all individuals live, and die, in community.

11 Where an individual is unable to make decisions in relation to his or her own affairs, the law cannot remain indifferent without consequences for both the individual and those who, living in community with the individual, deal with the individual. Where a person is unable, by reason of infirmity or death, to manage his or her affairs the law must accommodate that fact, one way or another.

12 There are no perfect solutions. Nevertheless, the law must struggle for perfection in an imperfect world: respecting the dignity of each individual, accommodating incapacity in the least restrictive way.

LIFE, DEATH AND BEYOND IN A "MANAGED SOCIETY"

13 In *Ancient Law* (1861), HS Maine wrote that "the movement of progressive [that is, non-static] societies has hitherto been a movement from *Status to Contract*". By this he meant a movement from a society in which reciprocal rights and obligations are determined by status within a family to a more individualistic society in which rights and obligations arise from agreements negotiated between individuals.

14 Maine wrote at a time when the first stirrings of a welfare state were emerging, with increasingly bureaucratised government and non-government sectors, and the influence of the codifying utilitarianism of Jeremy Bentham (1748-1832) was being felt in Britain and, incidentally, its Australian colonies.

15 Particularly since the last decades of the 20th century, Australia has developed beyond a society simply based upon "contract" to one in which the rights and obligations of citizens are (and are generally expected to be) managed by government in partnership with private or semi-private institutions. The nature and extent of this development has been masked by a parallel process of "deregulation" or "privatisation" (involving enduring powers of attorney, enduring guardianship appointments, private financial managers and different styles of institutional care) in the delivery of welfare services: see, for example, *M v M* [2013] NSWSC 1495.

16 With the growth of government and non-government bureaucracy associated with the modern welfare state, accompanied by the development of "administrative law" as a separate field of study in Anglo-Australian law, society has moved beyond Maine's norm of a social order in which reciprocal rights and obligations arise, essentially, from the free agreement of individuals. Freedom of choice is constrained by institutional imperatives, including market forces, beyond the influence of most individuals. An emphasis on consultative decision-making remains; but it is located in a legal

system, and administrative structures, which call for inter-personal rights and obligations to be managed, at least to some extent, by others than ourselves. From cradle to grave, we live in a *managed* society.

17 A paradigm assumption of that society is that the standard unit of society is an autonomous individual, living and dying in community, generally required, and able, to take care of himself or herself (within established social structures) but increasingly called upon to take steps in anticipation of age-related incapacity and the inevitability of death.

18 In the eyes of modern law, "death" is now, more than formerly, less an *event* and more a *process* that may commence before, and extend beyond, physical death. Incapacity for self-management is no longer, if it ever was, a rarity. Problems associated with management of the person, and property, of those unable to manage their own affairs are now commonly confronted in everyday life. The process of preparation for incapacity and death commonly commences with the execution of an enduring power of attorney and an enduring guardianship appointment. It may involve an application for a financial management order, a guardianship order or some derivative of such orders (such as a medical consent order), by whatever name known. It commonly continues until, after physical death, the prospect of an application for family provision relief peters out. A lawyer practising in succession law, particularly, needs to be familiar with the law, and legal practice, associated with the whole process.

19 An illustration of the necessity for that can be found in the need of an executor or administrator, in administration of a deceased estate, to consider whether property, transferred away from the deceased during his or her lifetime by an attorney purportedly exercising an enduring power of attorney, is recoverable consequentially upon a breach of fiduciary obligations by the attorney. For his or her part, an attorney who contemplates transferring property away from his or her incapacitated principal, in purported reliance upon an enduring power of attorney, should recognise that he or she may be held accountable for a breach of fiduciary obligations by action taken on behalf of the principal's deceased estate.

20 Three particular features of the "managed society" which Australia has become are: first, the widespread availability of enduring powers of attorney and enduring guardianship appointments as a means of facilitating private management of the affairs of an incapable person; secondly, the availability of a procedure for a court-authorised ("statutory") will to be made for a person lacking testamentary capacity; and, thirdly, the comparative ease with which concerns about capacity for self-management can often be addressed in a

specialist administrative tribunal without recourse to costly court proceedings. The process of managing the affairs of another person, said to lack capacity for self-management, is more broadly-based and flexible than once was the case.

21 Concepts of "capacity" are central to the whole process. When viewed in the abstract, *and* in the context of particular usage, the concept of "(in)capacity" implicitly demands an answer to the question: "(in)capacity for what?" The concept of "(in)capacity" is necessarily linked with something broader than itself.

22 The law governing "capacity" is governed by the purpose served by the law in the different spheres of life with which it engages.

23 Focussing attention on the law of succession (broadly defined), this can be seen, particularly, upon an exercise of each of the protective, probate and family provision jurisdictions of Australia's State Supreme Courts. The large issues encountered in Australian society by, and in, the law of succession can be seen in full measure through the prism of these courts.

24 The same prism challenges us constantly to inquire **why** a particular step can, and should, be taken. That is because a court's jurisdiction is governed by the purpose for which the jurisdiction exists.

25 A legal practitioner needs to be aware of traditional jurisdictional boundaries, their functionality and the purposes they serve. The concept of "jurisdiction" is often viewed as a limitation on decision-making; but it can also be (and in the ordinary course of decision-making it should be) seen as a concept that informs the making of sound decisions.

26 At the same time, a practitioner needs to understand that some basic tools of the modern law of succession (however defined) do not fit neatly within traditional jurisdictional boundaries, and it is necessary to be aware of how the law's purposes apply to those tools in various settings.

27 An "enduring power of attorney" (whether or not coupled with an "enduring guardianship appointment") straddles traditional boundaries of the common law, equity and protective jurisdictions. At common law, the authority of an agent is revoked by mental incapacity on the part of the agent's principal. By virtue of legislation, an enduring power of attorney operates in a manner similar to that of a "committee of the estate" known to the English Lord Chancellor's lunacy jurisdiction, save that an attorney is appointed prospectively by a principal anticipating his or her own future incapacity; an

enduring attorney is, in large measure, the equivalent of a “financial manager” without an engagement of the regulatory regime that governs a financial manager appointed by a court or statutory tribunal.

28 A “statutory will” sits squarely on the boundary between the law of probate and an exercise of protective jurisdiction. It is not wholly one or the other. The court is authorised to make a will, by an order of the court, for a person who is found to lack testamentary capacity. Such a person is, at least to the extent of lacking testamentary capacity, a person incapable of managing his or her affairs. Subject to any express legislative constraint, the Court’s power to authorise a “statutory will”, may be informed by principles governing an exercise of protective jurisdiction: *GAU v GAV* [2016] 1 Qd R 1; [2014] QCA 308; *Re K’s Statutory Will* (2018) 96 NSWLR 69; [2017] NSWSC 1711; *Re Fenwick* (2009) 76 NSWLR 22 at [132].

29 An appreciation of the law and practice governing an “enduring” appointment or the making of a “statutory will” requires familiarity with each type of jurisdiction liable from time to time to be engaged.

30 The **protective** jurisdiction exists for the purpose of taking care of those who cannot take care of themselves: *Secretary, Department of Health and Community Services v JWB and SMB (Marion’s Case)* (1992) 175 CLR 218 at 258-259. The Court focuses, almost single-mindedly, upon the welfare and interests of a person incapable of managing his or her own affairs, testing everything against whether what is to be done or left undone is or is not in the interests, and for the benefit, of the person in need of protection, taking a broad view of what may benefit, that person, but generally subordinating all other interests to his or hers.

31 The **probate** jurisdiction looks to the due and proper administration of a particular estate, having regard to any duly expressed testamentary intention of the deceased, and the respective interests of parties beneficially entitled to the estate. The task of the Court is to carry out a deceased person’s testamentary intentions, and to see that beneficiaries get what is due to them: *In the Goods of William Loveday* [1900] P 154 at 156; *Bates v Messner* (1967) 67 SR (NSW) 187 at 189 and 191-192.

32 The **family provision** jurisdiction, as an adjunct to the probate jurisdiction, looks to the due and proper administration of a particular deceased estate, endeavouring, without undue cost or delay, to order that provision be made for an eligible applicant (for relief out of a deceased estate) in whose favour an order for provision ”ought” to be made.

33 The protective, probate and family provision jurisdictions are central to the law of succession; but they must be evaluated in the broader context of common law rights and duties and the ameliorating role of a court of equity.

34 The traditional province of the **common law** is adjudication of claims of right, and the enforcement of correlative obligations, traditionally through the mechanism of a jury trial - in which community representatives pronounce a verdict of "yea" or "nay" on a particular claim upon which there has been a joinder of issues between identified contending parties. Common law cases are increasingly determined as are claims in equity, through case managed proceedings over which a judge (sitting alone) makes decisions about how issues are formulated, when and how they are determined, and when and how enforcement procedures are engaged.

35 A Supreme Court's protective, probate and family provision jurisdictions have a close affinity with the Court's general **equity** jurisdiction. They involve a discretionary element which stands in contrast to the common law's focus on competing claims of right. They generally involve the making of decisions about the management of a person or property in the context of at least one person who, by reason of incapacity or death, is not an active party to proceedings. The adversarial element that characterises a common law trial between parties assumed to be able to advance and protect their own interests is sometimes tempered by a greater need to consult the public interest. Where the common law is generally thought of in terms of "rules", the protective, probate and family provision jurisdictions are more readily thought of in terms of "principles".

36 The traditional province of a Supreme Court's general equity jurisdiction is the exercise of a discretionary jurisdiction, guided by established principles, designed to fill gaps in the law or to address injustice arising from a strict application of the law. It is essentially purposive in character insofar as a court is moved to grant, or withhold, discretionary relief (to restrain conduct or to compel the performance of a duty) for the purpose of preventing conduct which, according to its precepts, is unconscionable. Equitable principles are sometimes associated with Aristotle's concept of "equity" as practical wisdom or prudential reasoning in management of "exceptional" cases otherwise without a remedy: eg, Story, *Commentaries on Equity Jurisprudence* (1st English ed, London, 1884), chapter 1, paragraph 3; PW Young, C Croft and ML Smith, *On Equity* (Law Book Co, Australia, 2009), paragraph [1.50]; Aristotle, *The Nicomachean Ethics,* Book V, chapter 10; Book VI, chapter 5.

37 The law governing management of the estate or person of an incapable person, and administration of his or her deceased estate, is a fertile ground for Equity's paradigm of a "fiduciary" (sometimes spoken of in terms of a fiduciary *office*, fiduciary *relationships* or fiduciary *obligations*) because property managed for another or passing from one person to another is routinely required, at least for a time, to be held or dealt with by one person (a fiduciary) on the half of another (a beneficiary, or principal).

38 A primary contribution of equity jurisprudence is articulation of principles, and the provision of remedies, designed to hold a fiduciary to account for a breach of standards of conduct required of a fiduciary.

39 Those standards are inherent in the idea that a fiduciary is bound to act for and in the interests of the beneficiary, and not otherwise, in the performance of his, her or its functions as a fiduciary. Accordingly, a fiduciary is bound: (a) not to take, receive or retain an unauthorised profit or gain from his, her or its fiduciary office; and (b) not to place himself, herself or itself in a position of conflict between his, her or its duty to the principal and his, her or its own interests.

40 A combination of the process of privatisation of protective management services, and restrictions on the availability of public welfare services, has highlighted (in cases such as *Smith v Smith* [2017] NSWSC 408), and is increasingly likely to highlight, the fundamental importance of "fiduciary law" to community well-being: not only in theory, but also in terms of access to justice and the practical availability of effective remedies.

41 Although much discussion of the concept of a "fiduciary" is directed towards the management of *property* or misuse of a fiduciary relationship to divert opportunities for *property* away from a principal, fiduciary principles apply no less to management of "*the person*" of a person whose affairs are managed by another.

42 The powers conferred on a person by appointment as a guardian, enduring attorney or financial manager are "fiduciary powers" (in the sense described in Meagher, Gummow and Lehane's *Equity: Doctrines and Remedies*, 5th ed, LexisNexis Butterworths, Australia, 2015, paragraph [5-050]) in that that they must be exercised only for the purpose for which they are conferred, and not for a collateral purpose; particularly, not for the purpose of advancing the interests of the appointee.

43 Guardians, enduring attorneys and financial managers are conceptually similar in that they are authorised, and called upon, to exercise powers in

prudential management of the affairs of a person incapable of self-management; each office is governed by *a protective purpose*; there is a need to ensure that each office holder is *able and willing to perform the duties of the office* to which appointed; there is a need to ensure, so far as may be practicable, that an appointee to such an office *does not occupy a position of conflict* between his, her or its interests and duties to be performed; and supervision of such an office holder often involves not so much a determination of controversy mired in past conflict as an *assessment of risks involved in future management* of the affairs of a person incapable of self-management .

44 Although the law is necessarily defined by *rules,* the operation of the law is informed by its *functionality* and *purpose* along each step of the process leading from preparation for incapacity and death to completion of the administration of a deceased estate.

45 For an understanding of how modern law came about, and how an appreciation of Anglo-Australian legal history remains important for the due administration of Australian law, one must return to the time when the 18th century gave way to the 19th in Britain.

TERMINOLOGY

46 Addressing an audience of practitioners from different Australian jurisdictions, one needs to acknowledge that (although there is a broad similarity in law and practice across geographical boundaries and, as the High Court of Australia informs us, there is but one "common law" of Australia):

(a) there are different legislative, and administrative, regimes governing the management of the estate and person of an incapable person, and the administration of deceased estates.

(b) different labels may attach (particularly) to the office of a person appointed to manage the estate of an incapable person (that is, a "financial manager" or "administrator"), if not also a manager of the person of an incapable person (that is, a "guardian").

47 The language used across state boundaries by probate lawyers is essentially a common one. So too is the language used by family provision lawyers. And the High Court has not uncommonly published judgments in both areas.

48 The same is not true of cases (other than cases involving minors) involving an exercise of protective jurisdiction, formerly known as lunacy jurisdiction.

Cases of that type are likely to encounter differences of terminology, and practice, across state and territorial boundaries. For example, a "financial management order" made by the NSW Civil and Administrative Tribunal (NCAT) under the *Guardianship Act* 1987 NSW is broadly similar to an "administration order" made by the State Administrative Tribunal under the *Guardianship and Administration Act* 1990 WA.

49 Rather than be caught up in local differences of legislation, administration or practice, this paper takes as a universal model for protective management of the estate or person of an incapable person the historical jurisdiction of the 19th century office of the English Lord Chancellor - by reference to whose functions, powers and duties each Australian State Supreme Court has been vested with protective (lunacy) jurisdiction. See, for example, the *Supreme Court Act* 1970 NSW, section 22, preserving the effect of the *New South Wales Act* 1823 (Imp), the *Third Charter of Justice* 1823 and the *Australian Courts Act* 1828 (Imp) in NSW; and the *Supreme Court Act* 1935 WA, section 16(1)(d) in Western Australia.

50 In exposition of such jurisdiction, HS Theobald's *The Law Relating to Lunacy* (London, 1924) remains authoritative: *W v H* [2014] NSWSC 1696 at [29]-[34].

51 The Lord Chancellor routinely appointed a "committee of the estate" and/or a "committee of the person". In modern discourse, the former has its equivalent in a "financial manager" or "administrator". The latter, at least in the case of a person who is not a minor, has its equivalent in the appointment of a "guardian".

52 A protective manager (of an estate or person) occupies an office difficult to perform with perfection in every case. Effective protective management requires a manager entrusted with power to control property or person if and when necessary; sufficient empathy with the person in need of protection not to exercise any such power unless truly necessary; and the dedication, patience, maturity and wisdom to allow the person in need of protection to manage his or her own affairs as much as is reasonably practicable.

53 It is sometimes said that a person in need of protection needs "freedom to fail". This is entirely correct, within limits not easily defined except by reference to "practical wisdom". It highlights the "risk management" character of an exercise of protective jurisdiction.

54 A “financial manager” and a “guardian” have distinctive roles. However, their roles are often interdependent and difficult to distinguish in practice. Questions of accommodation may depend, for example, upon the availability of property and cooperation between a financial manager and guardian.

55 There is no absolute bar against one person, or institution, serving as both a financial manager and a guardian. However, there is utility in recognising a difference between the two types of office.

56 A necessity for property management does not necessarily carry with it a necessity for management of the person. Civil liberties are generally best preserved by only a slow embrace of coercive powers over the person: *M v M* [1981] 2 NSWLR 334

57 A professional property manager (such as a licensed trustee company) may not have an interest in, or aptitude for, management of the person even if (as is acknowledged) their management of property must be responsive to the needs of the person whose affairs are under management.

58 A separation of powers is often a safeguard of both good management of property and the preservation of personal liberties.

59 Conceptually, it remains true (adapting Theobald’s *The Law Relating to Lunacy*, page 41) that, subject to regulatory oversight:

(a) the manager of a protected estate generally has committed to it the custody, regulation, occupation, disposition and receipt of property; and

(b) a guardian has custody of the person, and regulation of government of the person, under guardianship.

60 In dealing with the protective jurisdiction, one may need to bear in mind the different historical origins of the Lord Chancellor’s jurisdiction over “infants” (sometimes called “wardship” jurisdiction), and his “lunacy” jurisdiction. However, as confirmed by *Marion’s Case* (1992) 175 CLR 218 at 258-259, the two jurisdictional streams now run together. That means that the Court’s general jurisdiction over a minor lacking capacity for self-management continues beyond his or her attainment of the age of majority (*Re AAA; Report on a protected person’s attainment of the age of majority* [2016] NSWSC 805) even though it might be prudent, if not necessary, to review the necessity for ongoing protective orders at or about the time the age of majority is attained.

61 In *Secretary, Department of Family and Community Services v Smith* (2017) 95 NSWLR 597; [2017] NSWCA 206 at [22] and [33]-[39] , the NSW Court of Appeal, in dismissing an application for leave to appeal because the point had not been argued at first instance, accepted English jurisprudence (sourced *to S v McC; W v W* [1972] AC 24 at 48 and, from there, to *J v C* [1970] AC 668 and the second half of the 19th century) to the effect that, in dealing with an infant, there is a distinction between a "custodial" and a "protective" aspect. The distinction is best explained in the words of the primary judge (now Brereton JA): "In the custodial aspect, which is related to the exercise of parental responsibility for the child, the child's welfare is paramount.… In the protective aspect, the child's welfare is relevant but not paramount, and must be balanced against the competing rights and interests of others, including the public. The protective aspect, though theoretically available, will not be exercised where the court is not exercising a supervisory role over some aspect of the child's care and upbringing…".

62 Whether this taxonomy is entirely compatible with Australian jurisprudence (a question open to debate), it must be acknowledged that, in some cases, the welfare of a person in need of protection may need to accommodate a broader public interest. A classic case is that of a forensic patient, the primacy of whose welfare must accommodate public safety in the event of a decision that he or she be released from detention: eg, *A (by his tutor Brett Collins) v Mental Health Review Tribunal (No. 4)* [2014] NSWSC 31 at [141] and [146] - [147].

63 Care needs to be taken not to assume that there is an identity between English and Australian law in this area.

64 Paradoxically, the different historical origins of the Lord Chancellor's infancy and lunacy jurisdictions might be a factor for treating with care modern the judgments of English courts about their "inherent" jurisdiction in dealing with "vulnerable" persons.

65 That is because: (a) historically, the Lord Chancellor's infancy jurisdiction was viewed in England as attaching automatically to his office, whereas his lunacy jurisdiction depended upon a personal grant of authority by the monarch to each Lord Chancellor; (b) after 1960, when English lunacy jurisdiction was specifically governed by statute, no grants of authority were made by the Queen to individual Lord Chancellors, and the view developed that the English High Court consequentially had no "inherent" lunacy jurisdiction; and (c) only in the 1990s did the English judiciary rediscover "inherent jurisdiction" to deal with cases of "vulnerable people.": *In re F (Mental Health Patient: Sterilisation)* [1990] 2 AC 1; *Masterman-Lister v Brutton & Co. (Nos. 1 and 2)*

[2003] 1 WLR 1511 at [70] ; *In re L (vulnerable adults with capacity: Court's jurisdiction (No. 2)* [2012] EWCA, Civ 253 [2012] 3 WLR 1439 at [55] , approving *In re SA* (v*ulnerable adult with capacity: marriage)* [2005] EWHC 2942 (Fam); [2006] 1 FLR 867.

66 Consciously distinguished from (but, at the same time, said to be substantially the same as) *parens patriae* jurisdiction, the newly discovered English "inherent jurisdiction" (as articulated in *In Re SA* [2006] 1 FLR 867 at [76]-[79]) is directed to protection of "*a vulnerable adult*, who, even if not incapacitated by mental disorder or mental illness, is, or is reasonably believed to be, either (i) under constraint; or (ii) subject to coercion or undue influence; or (iii) for some other reason deprived of the capacity to make [a] relevant decision, or disabled from making a free choice, or incapacitated or disabled from giving or expressing a real and genuine consent". See also Jonathan Herring, *Vulnerable Adults and the Law* (Oxford University Press, 2016), chapter 4; Brenda Hale, *Mental Health Law* (Thomson Reuters, England, 6th ed, 2017), paragraph [9.023].

67 There may, in the ultimate, be no substantial difference between Australian law governing persons incapable of self-management and English law governing a "vulnerable" person. However, modern English jurisprudence is based upon a perception of an institutional need for jurisdiction in the administration of law without drawing upon the deep roots available in England's own legal history.

68 Something similar to the English approach might be justified by reference to provisions such as section 23 of the *Supreme Court Act* 1970 NSW (which provides that the Court has "all jurisdiction which may be necessary for the administration of justice in New South Wales") , used as a foundation for "inherent" protective jurisdiction in parallel with that conferred on the Court by reference to the 19th century office of the English Lord Chancellor: eg, *Re W and L (parameters of protected estate management orders)* (2014) 94 NSWLR 300; [2014] NSWSC 1106 at [74] -[77]. *Cf, Fountain v Alexander* (1982) 150 CLR 615 at 633.

69 If Australian courts embrace fully the English idea that a Supreme Court has an inherent jurisdiction, necessary for the due administration of justice, to protect a "vulnerable" person, it might be necessary to re-consider whether it is open to a parliament to deprive the Court of that jurisdiction by legislation. The protective jurisdiction of a Supreme Court is no less "a defining characteristic" of such a Court than its supervisory, administrative law jurisdiction: *Cf, Kirk v Industrial Court of NSW* (2010) 239 CLR 531 at [98]-[100].

70 Although the nature of a Supreme Court's inherent, protective jurisdiction remains constant, the administrative machinery and procedures attending an exercise of such jurisdiction may change from time to time: *In re WM* (1903) 3 SR (NSW) 552 at 561, 567 and 569.

71 For that reason alone, a solution to any particular problem requires resort to the particular legislation and local practice governing it.

72 For a recent overview of all Australian States and Territories, see Richard McCullagh, *Australian Elder Law: Accommodation, Agency and Remedies* (Law Book Co, Australia, 2018).

AN EXCURSION INTO LEGAL HISTORY AS AN AID TO UNDERSTANDING CURRENT LAW

73 Under the influence of Lord Coke (1552-1634), through his report of *Beverley's Case* (1603) 4 Co Rep 132B; 76 ER 118 at 1122, and the form of the two principal writs of commission issued by Chancery for a common law trial by jury of the question whether a person was of unsound mind (the writ, *de idiota inquirendo* and the writ *de lunatic* inquirendo), English law tended to confine the concept of unsoundness of mind to a person accorded the status of an "idiot" (a "natural fool, lacking capacity from birth) or that of a "lunatic" (a person once of sound mind, but not so at the time of the jury's verdict): Sir William Blackstone, *Commentaries on the Laws of England* (9th "received" edition, 1783), Volume 1, pages 303-306; Sir William Holdsworth, *A History of English Law*, Volume 1 (7th edition revised, 1956), pages 473-476.

74 Lord Eldon (1751-1838), Lord Chancellor between 1801-1886 and 1807-1827, broke this mould in the early 19th century, building upon the practice of his predecessors over the previous decade or so.

75 In *Gibson v Jeyes* (1801) 6 Ves 267; 31 ER 1044 at 1047; 6 Ves Jun Supp 594; 34 ER 936 he accepted the concept of a "commission, not of lunacy, but in the nature of a writ of *de lunatic inquirend* " as one in which it was not necessary to establish lunacy, but it was sufficient that a person in need of protection was incapable of managing his own affairs.

76 In *Ridgeway v Darwin* (1802) 8 Ves 65; 32 ER 275 at 276, Lord Eldon took action to protect a person "unable to act with any proper and provident management, liable to be robbed by anyone; under that imbecility of mind, not strictly insanity, but as to the actual mischief calling for as much protection as actual insanity."

77 The jurisdiction over such persons was confirmed in *Ex parte Cranmer* (1806) 12 Ves 445; 33 ER 168 at 170-171 and in *Re Holmes* (1827) 4 Russ 182; 38 ER 774: *MS v ES* [1983] 3 NSWLR 199 at 202; *CCR v PS (No. 2)* (1986) 6 NSWLR 622 at 634 *et seq;* HS Theobold, *The Law Relating to Lunacy* (London, 1924), page 5.

78 It may be no coincidence that, as Lord Chancellor, Eldon was required to wrestle with the problem of a monarch plagued by recurrent bouts of mental illness: ALJ Lincoln and RL McEwen (eds), *Lord Eldon's Anecdote Book* (Stevens & Sons, London, 1960).

79 King George III (1738-1820) reigned from 1760 but, from 1810, through a Regent, the future George IV. His most notorious achievement was to preside over Britain's loss of America in the Revolutionary War, 1775-1783. For this, he has been treated harshly in historical memory.

80 Involuntarily, he made two important but lesser-known contributions to a modern understanding of mental health.

81 First, by his example of intermittent insanity (public knowledge from 1788) he created an environment in which the general community began to accept that mental illness could be treated medically, with recovery as a prospect: Kathleen Jones, *Lunacy, Law and Conscience*, *1744-1845: The Social History of the Care of the Insane* (Routledge, London, 1955), chapter 3. His personal example contributed to a fundamental shift in the public attitude to insanity.

82 Secondly, in 1800 he was the subject of an attempted assassination by James Hadfield, whose detention without legal authority after acquittal on the ground of insanity led to the enactment of legislation (now, in modified form, accepted as the norm) for the indefinite detention of the criminally insane.

83 Lord Eldon's seminal judgments on the nature and operation of the law of lunacy and the law of infants (which Australians identify as *parens patriae*, or protective, jurisdiction of their State Supreme Courts) exhibit a breadth of humanity which runs counter to his general reputation as a political conservative, if not reactionary, Lord Chancellor. One is tempted to speculate that his experience of "the madness of King George" (to borrow the title of a modern film) influenced his development of the law.

84 One of Lord Eldon's seminal judgments that continues to resonate with judges charged with exercising protective jurisdiction (as is illustrated by *Protective Commissioner v D* (2004) 60 NSWLR 513; [2004] NSWCA 216 at [152] and *W v H* [2014] NSWSC 1697 upon consideration whether an allowance can,

and should, be made out of a protected estate for members of a protected person's family) is *Ex parte Whitbread in the Matter of Hinde, a Lunatic* (1816) 2 Mer 99; 35 ER 878.

85 The principle established by that case is that a court might make an *ex gratia* allowance out of a protected estate – taking a broad view of what is for the benefit of the protected person – if satisfied that it is probable that the protected person himself or herself would have paid such an allowance.

86 On the way to formulating that principle, Lord Eldon demonstrated his appreciation of human frailty. That is evident in the following extract from his judgment:

> "For a long series of years the Court has been in the habit, in questions relating to the property of a Lunatic, to call in the assistance of those who are nearest in blood, not on account of any actual interest but because they are most likely to be able to give information to the Court respecting the situation of the property, and are concerned in its good administration. It has, however, become too much the practice that, instead of such persons confining themselves to the duty of assisting the Court with their advice and management, there is a constant struggle among them to reduce the amount of the allowance made for the Lunatic, and thereby enlarge the fund which, it is probable, may one day devolve upon themselves. Nevertheless, the court, in making [an] allowance, has nothing to consider but the situation of the Lunatic himself, always looking to the probability of his recovery, and never regarding the interest of the next of kin with this view only, in cases where the estate is considerable, and the persons who will probably be entitled to it hereafter are otherwise unprovided for, the Court, looking at what is likely the Lunatic himself would do, if he were in a capacity to act, will make some provision out of the estate for those persons."

87 With the benefit of long service as Lord Chancellor, Eldon was able to encapsulate in a few words the tensions ever present in management of the affairs of a person incapable of self-management.

88 The sentiments he expressed are not far removed from pressures encountered upon consideration of an application for a statutory will in the modern era, no less than upon an application for an *ex gratia* payment out of a protected estate.

89 As it happens, Australians have closer to home than 19th century England an example of a leading judge conditioned by personal exposure to the social pressures of mental health problems.

90 Sir Owen Dixon (1886-1972), a justice (1929-1952) and Chief Justice (1952-1964) of the High Court of Australia, was a member of the court which published the leading Australian authority on the approach of Australian law to mental incapacity for the transaction of civil, *inter vivos* business: *Gibbons v Wright* (1954) 91 CLR 423 at 437-438.

91 In a joint judgment bearing marks of Dixon CJ's authorship, the Court summarised the law as follows (with citation of authority omitted and editorial adaptation):

> "The law does not prescribe any fixed standard of sanity as requisite for the validity of all transactions. It requires, in relation to each particular matter or piece of business transacted, that each party shall have such soundness of mind as to be capable of understanding the general nature of what he is doing by his participation.... [The] mental capacity required by the law in respect of any instrument is relative to the particular transaction which is being effected by means of the instrument, and may be described as the capacity to understand the nature of that transaction when it is explained.... [One cannot consider soundness of mind in the air, so to speak, but only in relation to the facts and the subject matter of the particular case.]
>
> Ordinarily the nature of the transaction means in this connection the broad operation, the 'general purport' of the instrument; but in some cases it may mean the effect of a wider transaction which the instrument is a means of carrying out...."

92 We are told by Dixon's biographer that Dixon had a longstanding interest in the law of criminal insanity: Philip Ayres, *Owen Dixon* (Miegunya Press, Melbourne, 2003), page 75.

93 Evidence of that can be found in a paper entitled "A Legacy of Hadfield, M'Naghten and Maclean" delivered to a legal convention in Melbourne in 1957. It is reproduced in Dixon's *Jesting Pilate* (Law Book Co, Australia, 1965), pages 214-225.

94 In that paper Dixon was critical of the development of the criminal law insofar as, in his opinion: (1) It was based upon a confusion between the administration of criminal justice and the administration of the law relating to lunacy; and (2) as a result of *M'Naghten's Case* (1845) 10 Cl & F 200 at 208-212; 8 ER 718 at 722-723, the law's approach to the assessment of criminal insanity became rigidly formulaic.

95 Upon being sworn in as Chief Justice, Dixon affirmed the importance of political impartiality in constitutional cases using terminology which, by an unwarranted attribution to him of inflexibility, has haunted the reputation of his jurisprudence ever since. He said, "[there] is no other safe guide to judicial

decisions in great conflicts than a strict and complete legalism": *Jesting Pilate*, page 249.

96 Despite a stubborn reputation for "strict legalism", Dixon generally formulated legal principles in terms capable of subtlety in operation and open to development.

97 His maternal grandmother suffered from mental illness, and her husband struggled with alcohol; his father was an alcoholic: Ayres: *Owen Dixon*, pages pages 4-5 and 76.

98 In a classic Australian probate judgment (*Timbury v Coffee* (1941) 66 CLR 277) Dixon J upheld a jury verdict that (without the benefit of medical evidence) attributed testamentary incapacity to an alcoholic notwithstanding that the will thereby invalidated was ostensibly rational.

99 Drawing perhaps on his own experience of his father, he wrote (at 282-284):

> "The difficulty in the case lies in the fact that, except for his attitude towards and statements about his wife and except for the fact of his liability to frequent bouts of alcoholism, no ground would exist for impeaching the will. Under the conditions in which the last will was made, a stranger unacquainted with his history would perceive no ground for suspecting that he was not of testamentary capacity or for doubting the wisdom or justice of the dispositions he was making or for refusing to accept as rational the grounds he assigned for the provisions of his will.
>
> The difficulty of the case is not lessened by the circumstance that no medical evidence was called by either party, not even the evidence of the practitioner who had been the testator's medical attendant throughout the material period.…
>
> How far a court should go in treating the consequence of acute alcoholism as common general knowledge it is not easy to say, but in the present case the evidence makes it clear enough that the testator was an alcoholic paranoiac. With the withdrawal of alcohol from such a patient, physical signs of his condition disappear. He may be perfectly normal in his perceptions and sensations, his train of thought may be rational and strong and his memory good. But at the same time his judgement may continue in a state of disorder for a considerable length of time. We are not bound to go on applying views held over a century ago about mental disturbance and insanity and to disregard modern knowledge and understanding of such conditions…
>
> Although the case is not an easy one, the balance of probability appears to me to be that the testator's suspicions, distrust, resentment and tendency to hostility in relation to his wife were the characteristic consequences of his alcoholism. It is not a question of how far a rational man, suspicious by nature, might have formed the same views by a mis-construction based upon his wife's actions and associations. It is a question of the proper deduction

> from a history of the man and from the appearance of characteristic symptoms, the kind of antagonism and suspicion that might be expected as a consequence of his dipsomania.… "

100 How far one can read personal, social experience into the pronouncements of an appellate judge is at best debatable; but one is entitled to notice the agility of mind and broad understanding of life in Dixon J's judgment in *The Countess of Bective v Federal Commissioner of Taxation* (1932) 47 CLR 417 at 420-423.

101 His Honour's exposition of the law in that case remains foundational to an understanding of the "liability to account" of a "guardian" (broadly defined as including a financial manager, enduring attorney or enduring guardian), with emphasis added:

> "… [An] obligation to apply moneys in the maintenance of children or others does not involve the liability which arises from an ordinary trust. *It is a general rule that guardians of infants, committees of the person of lunatics, and others who are entrusted with funds to be expended in the maintenance and support of persons under their care are not liable to account as trustees*. They need not vouch the items of their expenditure, and, *if they fulfil the obligation of maintenance in a manner commensurate with the income available to them for the purpose, an account will not be taken*. Often the person to be maintained is a member of a family enjoying the advantages of a common establishment; always the end in view is to supply the daily wants of an individual, to provide for his comfort, edification and amusement, and to promote his happiness. *It would defeat the very purpose for which the fund is provided, if its administration were hampered by the necessity of identifying, distinguishing, apportioning and recording every item of expenditure and vindicating its propriety*. Although these considerations furnish an independent foundation for the general rule, yet, after all, it is a doctrine regulating the application of moneys payable under an instrument, whether a will, a settlement or an order of a Court of equity, and the operation of the doctrine must depend upon the provisions contained in the instrument, both express and implied. But the effect of the instrument will often be governed by the circumstances to which it was intended to apply, and, in particular, by a consideration of the nature of the actual abode, the condition of the household and the state of the family of the infant or other person to be maintained. *Courts of equity have not disguised the fact that the general rule gives to a parent or guardian dispensing the fund an opportunity of gaining incidental benefits, but the nature and extent of the advantages permitted must depend peculiarly on the intention ascribed to the instrument. ...*
>
> *A guardian is not permitted to receive moneys for maintenance without liability to account except upon the condition that he discharges his duty adequately to maintain and not otherwise. Upon his default the court will administer the fund or intercept the payments and has jurisdiction to order an account or an inquiry.… Where, however, the condition is performed the court does not inquire whether the money has been completely expended or whether the recipient has spent small sums for his personal benefit*, but,

nevertheless, *it remains an allowance to a person in a fiduciary capacity and for a definite purpose. ...*".

102 This statement of the law has been endorsed by the Full Court of the High Court of Australia in *Clay v Clay* (2001) 202 CLR 410 at 428-430 and 432-433. It remains central to the law governing the accountability of those who manage the affairs of persons incapable of self-management.

INCAPACITY IN THIS LIFE

Resolution of Transactional Disputes at Law or in Equity

103 Questions about a person's "capacity" often arise in respect of a particular transaction, in proceedings designed to enforce rights or obligations consequential upon a particular transaction, or in proceedings designed to set aside a particular transaction or to be relieved of obligations said to flow from a particular transaction.

104 In this realm, one commonly encounters an exercise of common law or equitable jurisdiction, directed towards determination of a particular dispute about past events. By the time of a contested hearing, the horse has often bolted. Even if relief having prospective operation is sought, the primary focus is upon the past in a dispute resolution process. In most cases, there is no ongoing management of person or property.

105 Such proceedings commonly take the form of adversarial litigation between contending parties (each separately represented) with or without a tutor as necessary.

106 In such proceedings the focus of a dispute about "capacity" might be blurred by an emphasis on concepts distinct, but not far removed, from a dispute about capacity. In common law proceedings, a *non est factum* defence to a claim in contract might reside on the periphery of concerns about capacity. In equity proceedings, a wider range of principles might be engaged: principally, those concerning unconscionability, undue influence and breaches of fiduciary obligations.

107 In dealing with the validity or otherwise of a particular transaction, the approach of the law to questions of "capacity" is generally that defined, and illustrated, by *Gibbons v Wright* (1954) 91 CLR 423 at 437-438 (earlier extracted). See also *Crago v McIntyre* [1976] 1 NSWLR 729; *PT Ltd v Maradona Pty Ltd* (1992) 25 NSWLR 643 at 673-675; *Ford v Perpetual*

Trustees Victoria Ltd (2009) 75 NSWLR 42; *Hanna v Raoul* [2018] NSWCA 201.

Protective Management of Present or Future, Systemic Risks

108 There is, or may be, a different emphasis upon an exercise of a Supreme Court's protective jurisdiction of the type classically described by the High Court of Australia in *Secretary, Department of Health and Community Services v JWB and SMB (Marion 's Case)* (1992) 175 CLR 218 at 258-259.

109 In protective proceedings, the Court's focus is not so much upon a particular past transaction as upon present and future capacity for management of his or her own person or property without assistance, looking forward rather than merely at past events, and assessing risks of exposure to harm or exploitation absent protection.

110 Whereas ordinary common law and equity proceedings generally focus on whether a vulnerable person was the subject of exploitation in a particular, past transaction, protective proceedings wrestle with a larger question about whether (going forward) a regime of systemic protection should be engaged.

111 In *Marion's Case* the High Court made the following observations, defining the nature of a Supreme Court's protective jurisdiction (here with editorial adaptation):

> "**The nature of the welfare jurisdiction**
>
> … [The] welfare jurisdiction conferred upon the Family Court [of Australia] is similar to the *parens patriae* jurisdiction [of a Supreme Court]. The history of that jurisdiction was discussed at some length by La Forest J in *Re Eve* [1986] 2 SCR at 407-417; (1986) 31 DLR (4th) at 14-21. His Lordship pointed out [at 410; 16] that '[the] Crown has an inherent jurisdiction to do what is for the benefit of the incompetent. Its limits (or scope) have not, and cannot, be defined.' In *Wellesley v Duke of Beaufort* [(1827) 2 Russ 1 at 20; 38 ER 236 at 243], Lord Eldon LC, speaking with reference to the jurisdiction of the Court of Chancery, said:
>
> > '[It] belongs to the King, as *parens patriae*, having the care of those who are not able to take care of themselves, and is founded on the obvious necessity that the law should place somewhere the care of individuals who cannot take care of themselves, particularly in cases where it is clear that some care should be thrown round them.'
>
> When that case was taken on appeal to the House of Lords, Lord Redesdale noted [*Wellesley v Wellesley* (1828) 2 Bli NS 124 at 131; 4 ER 1078 at 1081]:

> ‘Lord Somers resembled the jurisdiction over infants, to the care which the Court takes with respect to lunatics, and supposed that the jurisdiction devolved on the Crown, in the same way.”
>
> Lord Redesdale went on to say [at 136; 1083], that the jurisdiction extended ‘as far as is necessary for protection and education’.
>
> To the same effect were the comments of Lord Manners who stated [at 142; 1085] that ‘[it]’ is… impossible to say what are the limits of that jurisdiction.’ The more contemporary descriptions of the *parens patriae* jurisdiction over infants invariably accept that in theory there is no limitation upon the jurisdiction. [See *In re X (a minor)* [1975] Fam 47 at 51-52, 57, 60-61, and 61-62]. That is not to deny that the jurisdiction must be exercised in accordance with principle….
>
> No doubt the jurisdiction over infants is for the most part supervisory in the sense that the courts are supervising the exercise of care and control of infants by parents and guardians. However, to say this is not to assert that the jurisdiction is essentially supervisory or that the courts are merely supervising or reviewing parental or guardian care and control…. [The] *parens patriae* jurisdiction springs from the direct responsibility of the Crown for those who cannot look after themselves; it includes infants as well as those of unsound mind. So the courts can exercise jurisdiction in cases where parents have no power to consent to an operation, as well as cases in which they have the power. [The breadth of the wardship jurisdiction of the English courts was emphasised in *In re R [(a minor)]”*

112 Although the protective jurisdiction is commonly spoken of in terms that describe it as extending “as far as is necessary” and without defined limits, its exercise is confined by its purposive nature and a need for principled decision making.

113 One of the principles inherent in an exercise of protective jurisdiction is that a person the subject of the jurisdiction should be allowed as much autonomy as he or she is able to exercise without interference.

114 In *Marion’s Case* (a case concerning an intellectually disabled child) that principle found expression in the High Court’s approval (at 175 CLR 237-238) of the following observations of the House of Lords in *Gillick v West North AHA* [1986] AC 112 at 183-184:

> “Parental rights… do not wholly disappear until the age of majority…. but the common law has never treated such rights as sovereign or beyond review and control. Nor has our law ever treated the child as other than a person with capacities and rights recognised by law. The principle of the law…. is that parental rights are derived from parental duty and exist only so long as they are needed for the protection of the person and property of the child.”

115 The Court, accordingly, endorsed the observation in *Gillick* (at [1986] AC 189) that a minor is capable of giving informed consent (in that case, medical consent) when he or she "achieves a sufficient understanding and intelligence to enable him or her to understand fully what is proposed".

116 The principles approved by the High Court in *Marion's Case* find further elaboration in the judgment of the Canadian Supreme Court in *Re Eve*, expressly approved by the High Court.

The Nature of Protective Proceedings

117 Although there may be a close affinity between proceedings involving an exercise of protective jurisdiction and those involving an exercise of general equitable jurisdiction, the two are significantly different in nature and focus. An important distinction between them is that, whereas "[equity] practice is directed to litigation", the "practice [of the protective jurisdiction] should be [and generally is] directed to administration without strife in the simplest and least expensive way" : HS Theobald, *The Law Relating to Lunacy* (1924), page 382.

118 Proceedings involving an exercise of protective jurisdiction are essentially *administrative* in character (although, unconstrained, parties may seek to pursue them with adversarial zeal) and they are designed to protect the interests of a person in need of protection *going forward*. Although they may look to the past in aid of decision making about *future risks in management* of the affairs of a person in need of protection, they are not designed to delve deeply into the existence or otherwise of disputed claims about past events. They are commonly an exercise in risk management, necessarily summary in character. They are not a ready vehicle for litigation of disputed entitlements as between the person in need of protection and parties who may seek to be heard about the nature and course of protective management of that person's affairs.

119 Accordingly, a court should be slow to characterise as an abuse of the processes of the court proceedings instituted on behalf of an incapacitated person (or that person's deceased estate) to recover property allegedly diverted from his or her estate by a person or persons involved in protective management of his or her affairs and in litigation about management of those affairs: *Re Estate Nitopi, deceased* [2018] NSWSC 1560 at [89]-[100].

120 Too ready a preparedness to characterise recovery proceedings as an abuse of process, based upon a determination of earlier protective proceedings, might be a cause of injustice to an incapacitated person or to any person

entitled to claim through the incapacitated person. It might also serve as a licence to those involved in management of an incapable person's affairs to assume that, if they survive the relative informality of protective proceedings, they will have acquired an immunity from a liability to account for misdeeds committed in the course of their purported performance of fiduciary obligations.

A Human Rights Narrative?

121 With its *raison d'être* located in a need to take care of those who cannot take care of themselves; with its almost single-minded focus on protection and promotion of the interests of a person in need of protection; with its insistence that protective jurisdiction be exercised, if at all, in a manner which restricts in the least restrictive way the autonomy of a person in need of protection; and with its heavy emphasis upon preserving the dignity of such a person, the protective jurisdiction of a Supreme Court is necessarily respectful of "human rights". It cannot otherwise be true to its governing purpose and ideas that inform its exercise.

122 Upon an exercise of protective jurisdiction, some (but not all) minds might be assisted in decision making by an appeal to a human rights narrative. An example of this is *Director General, Department of Community Services; re Thomas* [2009] NSWSC 217; (2009) 41 Fam LR 220 at [37]-[38], in which, Brereton J (as his Honour then was) encouraged courts exercising *parens patriae* jurisdiction affecting a child to take into account as a relevant consideration the United Nations *Convention on the Rights of the Child*.

123 A human rights narrative might inform a court's consideration of what is required to respect the dignity of an individual in need of protection; but care needs to be taken not to allow any form of "rights narrative" to limit a jurisdiction which, as *Marion's Case* (1992) 175 CLR 218 at 258 confirms, has limits which have not been, and cannot be, defined save by reference to the protective purpose of the jurisdiction. Brereton J was acutely conscious of this in his determination that it was open to the Court, and appropriate in the particular case, to make orders restricting the liberty of a young person under care.

Definitions of "incapacity for self-management"

124 Concepts such as "incapacity for self-management" (variously described) are not easily made the subject of exhaustive definition. Although the two concepts are broadly similar, according to their nature different considerations

may apply to discussion of incapacity for self-management of "the person" and discussion of incapacity for self-management of an "estate".

125 The following observations, taken from *CJ v AKJ* [2015] NSWSC 498 at [27]-[43], canvass definitional questions generally:

> "27. In the absence of an express legislative definition, the expression "(in)capable of managing his or her affairs" should be accorded its ordinary meaning, able to be understood by the broad community (lay and professional) it serves, remembering that:
>
> (a) the concept of incapacity for self-management is an integral part of the protective jurisdiction which, historically, arose from an obligation of the Crown (now more readily described as the State) to protect each person unable to take care of him or her self: *Marion's Case* (1992) 175 CLR 218 at 258, citing *Wellesley v Duke of Beaufort* (1827) 2 Russ 1 at 20; 38 ER 236 at 243.
>
> (b) of central significance is the functionality of management capacity of the person said to be incapable of managing his or her affairs, not: (i) his or her status as a person who may, or may not, lack "mental capacity" or be "mentally ill"; or (ii) particular reasons for an incapacity for self-management: *PB v BB* [2013] NSWSC 1223 at [5]-[9] and [50].
>
> (c) the focus for attention, upon an exercise by the Court of its protective jurisdiction (whether inherent or statutory), is upon protection of a particular person, not the benefit, detriment or convenience of the State or others: *Re Eve* [1986] 2 SCR 388 at 409-411, 414, 425-428, 429-430, 431-432 and 434; (1986) 31 DLR (4th) 1 at 16-17, 19, 28-30, 31, 32 and 34; *JPT v DST* [2014] NSWSC 1735 at [49]; *Re RB, a protected estate family settlement* [2015] NSWSC 70 at [54].
>
> (d) the "affairs" the subject of an enquiry about "management" are the affairs of the person whose need for protection is under scrutiny, not some hypothetical construct: *Re R* [2014] NSWSC 1810 at [94]; *PB v BB* [2013] NSWSC 1223 at [6].
>
> (e) an inquiry into whether a person is or is not capable of managing his or her affairs focuses not merely upon the day of decision, but also the reasonably foreseeable future: *McD v McD* [1983] 3 NSWLR 81 at 86C-D; *EB & Ors v Guardianship Tribunal & Ors* [2011] NSWSC 767 at [136].
>
> (f) the operative effect given to the concept of capacity for self-management, upon an exercise of protective jurisdiction by the Court (whether inherent or statutory), is informed, *inter alia*, by a hierarchy of principles, proceeding from a high to a lower level of abstraction; namely:

(i) an exercise of protective jurisdiction is governed by the purpose served by the jurisdiction (protection of those not able to take care of themselves): *Marion's Case* (1992) 175 CLR 218 at 258.

(ii) upon an exercise of protective jurisdiction, the welfare and interests of the person in need of protection are the (or, at least, a) paramount consideration (the "welfare principle"): *Holt v Protective Commissioner* (1993) 31 NSWLR 227 at 238B-C and 241A-B and F-G; *A (by his tutor Brett Collins) v Mental Health Review Tribunal (No 4)* [2014] NSWSC 31 at [146]-[147].

(iii) the jurisdiction is parental and protective. It exists for the benefit of the person in need of protection, but it takes a large and liberal view of what that benefit is, and will do on behalf of a protected person not only what may directly benefit him or her, but what, if he or she were able to manage his or her own affairs, he or she would, as a right minded and honourable person, desire to do: H.S. Theobald, *The Law Relating to Lunacy* (London, 1924), pages 362-363, 380 and 462: *Protective Commissioner v D* (2004) 60 NSWLR 513 at 522 [55] and 540 [150].

(iv) whatever is to be done, or not done, upon an exercise of protective jurisdiction is generally measured against what is in the interests, and for the benefit, of the person in need of protection: *Holt v Protective Commissioner* (1993) 31 NSWLR 227 at 238D-F and 241G-242A; *GAU v GAV* [2014] QCA 308 at [48].

28. The Court's inherent jurisdiction has never been limited by definition. Its limits (and scope) have not, and cannot, be defined: *Marion's Case* (1992) 175 CLR 218 at 258, citing *Re Eve* [1986] 2 SCR 388 at 410; (1986) 31 DLR (4th) 1 at 16; *Wellesley v Duke of Beaufort* (1827) 2 Russ 1 at 20; 38 ER 236 at 243; and *Wellesley v Wellesley* (1828) 2 Bli. NS 124 at 142; 4 ER 1078 at 1085.

29. The jurisdiction, although theoretically unlimited, must be exercised in accordance with its informing principles, governed by the purpose served by it.

30. Although the concept of "a person… incapable of managing his or her affairs" is foundational to the Court's protective jurisdiction in all its manifestations (inherent and statutory), the purposive character of the jurisdiction is liable, ultimately, to confront, and prevail over, any attempt at an exhaustive elaboration of the concept in practice decisions.

31. From time to time one reads in judgments different formulations of the, or a, "test" of what it is to be "a person (in)capable of managing his or her affairs". Convenience and utility may attach to such "tests", but only if everybody remembers that they provide no substitute for a direct engagement with the question whether the particular person

under scrutiny is, or is not, "(in)capable of managing his or her affairs", informed by "the protective purpose of the jurisdiction" being exercised, and the "welfare principle" derived from that purpose.

32. The general law does not prescribe a fixed standard of "capacity" required for the transaction of business. The level of capacity required of a person is relative to the particular business to be transacted by him or her, and the purpose of the law served by an inquiry into the person's capacity: *Gibbons v Wright* (1954) 91 CLR 423 at 434-438.

33. The same is true of "capacity" for self-management, upon an exercise of protective jurisdiction, governed by the protective purpose of the jurisdiction, viewed in the context of particular facts relating to a particular person in, or perceived to be in, need of protection.

34. Once this is accepted, there is scope for appreciation of different insights available into the meaning, and proper application, of the concept that a person is "(in)capable of managing his or her affairs".

35. Four different formulations of the concept may serve as an illustration of this.

36. First: Without any gloss associated with "the ordinary affairs of man" Powell J's formulation, in *PY v RJS* [1982] 2 NSWLR 700 at 702B-E, of what it is to be "a person incapable of managing his or her affairs" might usefully be recast as follows:

'… a person is not shown to be incapable of managing his or her own affairs unless, at least, it appears:

(a) that he or she appears incapable of dealing, in a reasonably competent fashion, with [his or her affairs]; and

(b) that, by reason of that lack of competence there is shown to be a real risk that either:

(i) he or she may be disadvantaged in the conduct of such affairs; or

(ii) that such moneys or property which he or she may possess may be dissipated or lost (see *Re an alleged incapable person* (1959) 76 WN (NSW) 477); it is not sufficient, in my view, merely to demonstrate that the person lacks the high level of ability needed to deal with complicated transactions or that he or she does not deal with even simple or routine transactions in the most efficient manner: See *In the Matter of Case* (1915) 214 NY 199, at page 203, per Cardozo J… [emphasis supplied]'.

37. Secondly: An alternative formulation, found in *EB and Ors v Guardianship Tribunal and Ors* [2011) NSWSC 767 at [134] per

Hallen AsJ, is to the effect that a person can be characterised as "incapable of managing his or her affairs" if his or her financial affairs are of such a nature that action is required to be taken, or a decision is required to be made, which action or decision the person is unable to undertake personally, and which will not otherwise be able to be made unless another person is given the authority to take the action or make the decision.

38. Thirdly: An approach which commends itself to me, in this case, is to record that, in considering whether a person is or is not capable of managing his or her affairs:

(a) a focus for attention is whether the person is able to deal with (making and implementing decisions about) his or her own affairs (person and property, capital and income) in a reasonable, rational and orderly way, with due regard to his or her present and prospective wants and needs, and those of family and friends, without undue risk of neglect, abuse or exploitation; and

(b) in considering whether a person is "able" in this sense, attention may be given to: (i) past and present experience as a predictor of the future course of events; (ii) support systems available to the person; and (iii) the extent to which the person, placed as he or she is, can be relied upon to make sound judgments about his or her welfare and interests.

39. Fourthly: Drawing upon the legislation that governs the Guardianship Division of NCAT in determining whether or not to make a financial management order (*Guardianship Act*, Part 3A, particularly sections 25E and 25G, read with sections 3(2) and (4)), it might be said that, in common experience, whether a person is or is not "capable of managing his or her own affairs" might be determined by reference to the following questions:

(a) whether the person is "disabled" within the meaning of sections 3(2) (a)-(d). That is, whether the person is: intellectually, physically, psychologically or sensorily disabled; of advanced age; a mentally ill person; or otherwise disabled;

(b) whether, by virtue of such a disability, the person is (within the meaning of section 3(2)) "restricted in one or more major life activities to such an extent that he or she requires supervision or social habilitation"; and

(c) whether, despite any need he or she has for "supervision or social habilitation" (section 3(2)):

(i) he or she is reasonably able to determine what is in his or her best interests, and to protect his or her own welfare and interests, in a normal, self-reliant way without the intervention of a protected estate manager (sections 4 (a)-(c), 4(f), 25G (b) and 25G (c)).

(ii) he or she is in need of protection from neglect, abuse or exploitation (sections 4(a), 4(g), 25G(b) and 25G(c)).

40. The utility of each of these formulations depends on whether (and, if so, to what extent) it is, in the particular case, revealing of reasoning justifying a finding that a person is or is not (as the case may be) capable of managing his or her affairs, having regard to the protective purpose of the jurisdiction being exercised and the welfare principle.

41. In each case care needs to be taken not to allow generalised statements of the law or fact-sensitive illustrations to be substituted for the text of any legislation governing the particular decision to be made and, in its particular legislative context, the foundational concept of capacity for self-management.

42. Whatever form of words may be used in elaboration of that concept, it needs to be understood as subordinate to, and of utility only insofar as it serves, the purpose for which the protective jurisdiction exists.

43. Likewise, ultimately, whatever is done or not done on an exercise of protective jurisdiction must be measured against whether it is in the interests, and for the benefit, of the particular person in need of protection: *GAU v GAV* [2014] QCA 308 at [48]. That touchstone flows from the core concern of the Court's inherent jurisdiction with the welfare of the individual, and it finds particular expression in the *NSW Trustee and Guardian Act*, section 39(a)."

126 The shift from reasoning about the "status" or "mental illness" of an incapable person to reasoning about "functionality" of capacity for self management was noticed by the NSW Court of Appeal in *David by her Tutor the Protective Comissioner v David* (1993) 30 NSWLR 417 at 436-437.

A Summary of Parens Patriae Propositions

127 The following propositions about the nature, scope, purpose and exercise of a Supreme Court's protective jurisdiction (not intended to be exhaustive of the topic) emerge from its study:

(1) **The jurisdiction exists for the purpose of taking care of those who are not able to take care of themselves**: *Marion's Case* (1992) 175 CLR 218 at 258; *Re Eve* [1986] 2 SCR 388 at 425-426; (1986) 31 DLR (4^{th}) 1 at 28.

(2) The jurisdiction extends to protection of any individual who (by reason of age or infirmity) is incapable of self-management and (a) whose person or property is within the territorial jurisdiction of the Court; or (b) who is a citizen of Australia; or (c) who has been abducted from

Australia: M Davies, AS Bell and PLG Brereton (eds), *Nygh's Conflict of Laws in Australia* (Lexis Nexis, Australia, 9th ed, 2014), paragraphs [28.10]-[28.21] and [31.1]; Young Croft and Smith, *On Equity*, paragraph [4.220].

(3) The jurisdiction extends to orders affecting either the person or estate (property) of a person in need of protection, or both: *Re Eve* [1986] 2 SCR 388 at 426; (1986) 31 DLR (4th) 1 at 28. Although terminology may differ depending on context, the jurisdiction extends to appointment of a person to "manage" the person or estate of an incapable person: *IR v AR* [2015] NSWSC 1187 at [100]-[118]. It extends, also, to the making of orders regulating access allowed to an incapable person: *RH v CAH* [1984] 1 NSWLR 694 at 707.

(4) There is no formal *locus standi* requirement restricting the identity of a person who may apply for an exercise of protective jurisdiction affecting another; a stranger may apply for the making, or revocation, of protective orders. A question of standing ultimately returns to the rationale for the protective jurisdiction itself – the need for an accessible remedy for the protection of a person who, unable to manage his or her own affairs, is in need of protection: *Re W and L (Parameters of Protected Estate Management Orders)* [2014] NSWSC 1106 at [92]-[94].

(5) The jurisdiction is discretionary in character: *Re Eve* [1986] 2 SCR 388 at 427 and 437; (1986) 31 DLR (4th) 1 at 29 and 36.

(6) The jurisdiction is not a "consent jurisdiction". Orders of the Court are not made merely because a party, or some other person, seeks it, consents to it or acquiesces in it. The Court is bound to exercise an independent judgement because of the public interest element in the decision to be made and the possibility, if not the fact, that the person in need of protection lacks the mental capacity requisite to informed decision-making: *Ability One Financial Management Pty Ltd and Anor v JB by his Tutor AB* [2014] NSWSC 245 at [35](a).

(7) **Care needs to be taken, in all decision-making affecting a person in need of protection, to focus on the facts of the particular case, preferably with due consultation with the affected person, his or her family and carers who may be well placed to inform the Court of his or her particular circumstances**: *Ability One Financial Management Pty Ltd and Anor v JB by his Tutor AB* [2014] NSWSC 245 at [35](d).

(8) Depending on the nature of the case, the jurisdiction may be exercised cautiously (*Re Eve* [1986] 2 SCR 388 at 427; (1986) 31 DLR (4th) 1 at 29), and the fact that jurisdiction exists to make orders upon an exercise of protective jurisdiction does not mean that orders will necessarily be made (*Re Eve* [1986] 2 SCR 388 at 437; (1986) 31 DLR (4th) 1 at 36; *MS v ES* [1983] 3 NSWLR 199 at 203B; *RH v CAH* [1984] 1 NSWLR 694 at 706G).

(9) **The limits (or scope) of the jurisdiction have not been, and cannot be, defined**: *Marion's Case* (1992) 175 CLR 218 at 258.

(10) **The categories of case in which the jurisdiction can be exercised are not closed**. **The jurisdiction is of a very broad nature. It can be invoked in such matters as custody (parental responsibility), protection of property, health problems, religious upbringing and protection against harmful associations**: *Re Eve* [1986] 2 SCR 388 at 426, 427 and 437-438; (1986) 31 DLR (4th) 1 at 28, 28-29 and 36-37.

(11) **The jurisdiction must be exercised in accordance with its informing principle; namely, to do what is necessary for the benefit, and in the interests, of the person in need of protection**: *Re Eve* [1986] 2 SCR 388 at 414 and 427; (1986) 31 DLR (4th) 1 at 19.

(12) **The jurisdiction is to be exercised for the benefit of *that* person, not for the benefit, or convenience, of others or the state; the welfare and interests of the person in need of protection are the paramount consideration**: *Re Eve* [1986] 2 SCR 388 at 427, 429-430 and 434; (1986) 31 DLR (4th) 1 at 29, 31 and 34.

(13) **What is done, or not done, upon an exercise of protective jurisdiction is to be measured against what is for the benefit, and in the interests, of the person in need of protection**: *Holt v Protective Commissioner* (1993) 31 NSWLR 227 at 238D-F and 241G-242A; *GAU v GAV* [2016] 1 Qd R 1 at 25[48].

(14) **The protective jurisdiction is parental and protective. It exists for the benefit of the person in need of protection, but it takes a large and liberal view of what that benefit is, and will do on behalf of the person in need of protection not only what may directly benefit him or her, but what, if he or she were fully capable, he or she would as a right minded and honourable person desire to do**: H S Theobald, *The Law Relating to Lunacy* (London, 1924), page 380; *Protective Commissioner v D* (2004) 60 NSWLR 513 at 540-541.

(15) The jurisdiction may be exercised, in the interests of a person in need of protection, against *prospective* as well as *present* harm: *Re Eve* [1986] 2 SCR 388 at 426; (1986) 31 DLR (4th) 1 at 28.

(16) The Court will not risk of the incurring of damage to a person in need of protection which it cannot repair, but it will act rather to prevent damage being done: *Re Eve* [1986] 388 at 428 and 430; (1986) 31 DLR (4th) 1 at 29-30 and 31.

(17) The legal disabilities of infancy are not absolute. Recognition needs to be given to the fact that an infant may be able to manage his or her affairs, depending upon age, maturity and all the circumstances of the case: *AG v AP-G* [2013] NSWSC 272 at [7]; *JP v CP* [2013] NSWSC 273 at [2]. An infant's incapacity to give an informed consent to medical treatment diminishes with his or her growth in understanding and his or her need of protection: *Marion's Case* (1992) 175 CLR 218 at 237-238.

(18) The protective jurisdiction extends to the making of a "secured accommodation order", depriving an infant of his or her liberty in a case in which it is necessary for his or her protection from harm: *Director-General, Department of Community Services; Re Thomas* [2009] NSWSC 21; (2009) 41 Fam LR 220 (see also [2009] NSWSC 625 and [2010] NSWSC 1525); *Re Sally* [2009] NSWSC 1141; *Re Sally* [2011] NSWSC 1696; *Re Anita* [2015] NSWSC 312.

(19) The Court's jurisdiction is not limited to supervision of decisions made by a parent, or some other person taking care, of a person in need of protection; the jurisdiction is not confined to what a guardian, or manager, might do *vis-a-vis* the person in need of protection: *Marion's Case* (1992) 175 CLR 218 at 258-259.

(20) The jurisdiction also extends to:

(a) the appointment of a tutor (*Re P* [2006] NSWSC 1082, approved in *Bobolas v Waverley Council* [2012] NSWCA 126 at [60]-[62]), or some other form of representation (*Re Eve* [1986] 2 SCR 388 at 438; (1986) 31 DLR (4th) 1 at 37), for the conduct of proceedings by or on behalf of the person in need of protection.

(b) approval, or otherwise, of a settlement of proceedings to which a person in need of protection is a party: *Permanent Trustee Company Limited v Mills* (2007) 71 NSWLR 1 at 4-5.

(21) Where necessary to avoid frustration of the purpose for which the protective jurisdiction of the Court exists, the principles governing procedural fairness may be qualified: *J v Lieschke* (1987) 162 CLR 447 at 457.

(22) Upon an exercise of protective jurisdiction, when endeavouring to ascertain what is in the interests and for the benefit of the person in need of protection, the Court is not bound by rules of evidence: *Roberts v Balancio* (1987) 8 NSWLR 436; *Re Victoria* (2002) 29 Fam LR 157; *CAC v Secretary, Department of Family and Community Services* [2014] NSWSC 1855 at [7]-[8].

(23) The protective jurisdiction of the Court is not displaced by legislation absent a clear legislative intention that it be so displaced: *Johnson v Director-General of Social Welfare (Victoria)* (1976) 135 CLR 92 at 97 and 100; *Re Eve* [1986] 2 SCR 388 at 426; 31 DLR (4th) 1 at 28; *X v The Sydney Children's Hospitals Network* (2013) 85 NSWLR 294 at 301 [26]-[27].

(24) The *parens patriae* jurisdiction is generally reserved for dealing with uncontemplated, or exceptional, situations where it appears necessary for the jurisdiction to be invoked for the protection of those who fall within its ambit: *Re Eve* [1986] 2 SCR 388 at 411; (1986) 31 DLR (4th) 1 at 17.

(25) The Court exercises caution in entertaining *parens patriae* jurisdiction in cases in which a specialist court or tribunal exercises specialist, statutory jurisdiction, subject to a special appeal procedure. The Court is concerned not to undermine the integrity of statutory procedures. The standard approach is that of Palmer J in *Re Victoria* [2002] NSWSC 647; 29 Fam LR 157 at [37]-[40], supplemented by that of White J in *Re Frieda and Geoffrey* [2009] NSWSC 133; 40 Fam LR 608. An exercise of *parens patriae* jurisdiction in this context requires "exceptional circumstances".

(26) The Court's jurisdiction may be called in aid specifically to reinforce a statutory appellate procedure (*Re B (No. 1)* [2011] NSWSC 1075 at [58]-[60]; *P v NSW Trustee and Guardian* [2015] NSWSC 579 at [116]) or to supplement statutory appointments of financial manager and guardian (*IR v AR* [2015] NSWSC 1187 at [115]-[118]).

(27) Upon an exercise of protective jurisdiction, the Court aims to give effect to a prudential regime for management of the affairs of the person in

need of protection (*managing risk* prudentially), without strife, in the simplest and least expensive way, in the interests of that person: *Ability One Financial Management Pty Ltd and Anor v JB by his Tutor AB* [2014] NSWSC 245 at [35](f). The jurisdiction is not encumbered with technicalities: *Re Application of Local Health District; Patient Fay* [2016] NSWSC 624 at [23].

A LIFE IN TRANSITION: TESTAMENTARY CAPACITY, AND PROBATE LAW AND PRACTICE

128 A person whose affairs are under protective management is not conclusively presumed to lack testamentary capacity to make a will: *Perpetual Trustee Company Ltd v Fairlie-Cunningham* (1993) 32 NSWLR 377.

129 In a probate suit questions about testamentary capacity are generally determined by reference to the following classic observations in *Banks v Goodfellow* (1870) LR 5 QB 549 at 565, whether it is a "formal will" (governed by the provisions such as section 6 of the *Succession Act* 2006 NSW) or an "informal will" (governed by provisions such as section 8 of that Act) that is sought to be admitted to probate:

> "It is essential to the exercise of [a power to make a will] that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties – that no insane delusion shall influence his will in disposing of his property and bringing about a disposal of it which, if the mind had been sound, would not have been made."

130 The dynamics of an application for probate of a "formal" will and an application for admission of an "informal" document to probate may differ because of the nature of the particular document propounded; the traditional role of a "presumptions" in determination of an application for probate of formal will (*Bailey v Bailey* (1924) 34 CLR 558 at 570 *et seq*; *Re Hodges; Shorter v Hodges* (1988) 14 NSWLR 698 at 704-707); the absence of any presumption arising from "due execution" of a will in an informal will case (*Re Estate of Wai Fun Chan, deceased* [2015] NSWSC 1107 at [18]-[24]); and the focused attention of legislation for the admission to probate of an "informal will" on "a document that purports to state the testamentary intentions of a deceased person" as the primary criterion.

131 Uncontroversially, a party who propounds a document as a will (of whatever description) bears the onus of proving that the document is the will of the deceased.

132 The ultimate question for the Court, on an application for probate or for administration with the will annexed, is whether, acting judicially, it is satisfied that a document propounded as a will is the last will of a free and capable testator: *Tobin v Ezekiel* (2012) 83 NSWLR 757 at [44]; *Woodley-Page v Symons* (1987) 217 ALR 25 at 35.

133 Questions about the essential validity of a will in a probate suit are generally determined on pleadings, with a customary style, reminiscent of an old-style form of common law "issue" pleading, rather than the equity form of "fact pleading" favoured in civil proceedings generally. Rather than pleading and particularising a detailed narrative of facts material to the Court's decision-making, the plaintiff pleads a general allegation that the deceased died leaving an identified will and property within the jurisdiction, and a defendant pleads and particularises one or more standard forms of defence.

134 The standard grounds of defence to an application for a document to be admitted to probate are:

(a) an allegation that, at the time a will was made, the will-maker lacked "testamentary capacity".

(b) an allegation that a will was not made with "knowledge and approval" of the contents of the will on the part of the will-maker.

(c) an allegation that will was obtained by an exercise of "undue influence" (meaning, in probate law, "coercion") on the part of an identified individual or individuals.

(d) an allegation that a will was obtained by the "fraud" of an identified individual or individuals.

135 A defendant who pleads a want of "testamentary capacity" commonly also pleads a want of "knowledge and approval".

136 Not uncommonly, there is, in cases of all descriptions, an allegation of "suspicious circumstances" surrounding the making of a will sufficient to negate any presumption of knowledge and approval arising from a finding of testamentary capacity and due execution of a will: *Nock v Austin* (1918) 25

CLR 519 at 528; *Tobin v Ezequiel* (2012) 83 NSWLR 757. The fact that a finding of "suspicious circumstances" is, technically, directed towards negation of a presumption of knowledge and approval (rather than negation of a finding of validity on the ultimate question) is lost on most pleaders. An allegation of "suspicious circumstances" serves their forensic purpose of poisoning the well from which an opponent may seek to draw.

137 A traditional exposition of probate law in terms of "presumptions" is not wholly apt to the determination of a probate suit without a jury. In a modern form of "judge alone (case managed) trial" , heard on affidavit evidence read on both sides of the record before deponents are cross examined, it can be artificial to analyse a case in terms of a "*prima facie* case" or dispositive "presumptions". By the time a judge is called upon to determine a case, it generally must be determined on all the evidence then before the court, drawing whatever inferences may be available from that evidence. It may be that what are described as "presumptions" are best seen as "inferences" drawn on the basis of common experience arising from proof of particular facts material to the ultimate question for the court's determination, or simply as guidelines for principled decision-making. *Cf, Carr v Homersham* [2018] NSWCA 65 at [46]-[47].

138 From time to time, *Banks v Goodfellow* is criticised as out of touch with modern medicine. More often than not, that criticism is a product of the difficulty of having to draw a line about a person's testamentary capacity as he or she descends into incapacity. There is often room for debate amongst medicos as well is lawyers.

139 In *Zorbas v City Sidiropoulous (No. 2)* [2009] NSWCA 197 at [65], Hodgson JA underscored that point in the following terms:

> "The criteria in *Banks v Goodfellow* are not matters that are directly medical questions, in a way that a question whether a person is suffering from cancer is a medical question. They are matters for commonsense judicial judgement on the basis of the whole of the evidence. Medical evidence as to the medical condition of a deceased may of course be highly relevant, and may sometimes directly support or deny a capacity in the deceased to have understanding of the matters in *Banks v Goodfellow* criteria. However, evidence of such understanding may come from non-expert witnesses. Indeed, the most compelling evidence of understanding would be reliable evidence (for example, a tape recording) of a detailed conversation with the deceased at this time of the will displaying understanding of the deceased's assets, the deceased's family and the effect of the will. It is extremely unlikely that medical evidence that the deceased did not understand these things would overcome the effect of evidence of such a conversation."

FAMILY PROVISION JURISDICTION: THE COMMUNITY SPEAKS FOR THE WISE AND JUST TESTATOR

140 A claim for a family provision order does not directly raise a question of "testamentary capacity" for the court's determination; but: (a) an application for family provision relief is commonly made in the alternative to a defence to an application for probate of a will; (b) an application for family provision relief is commonly seen as a cheaper alternative to engagement in a probate suit; and (c) even if admission of an unfavourable will to probate is not contested, an applicant for family provision relief will not uncommonly endeavour to cast doubt on the soundness of mind of the will-maker who allegedly left him or her without adequate provision.

141 In disposition of an application for family provision relief, the Court must generally endeavour to place itself in the position of the deceased, and to consider what he or she ought to have done in all the circumstances of the case, treating the will-maker for that purpose as wise and just, rather than fond and foolish (*In re Allen* [1922] NZLR 218 at 220-221; *Bosch v Perpetual Trustee Company Ltd* [1938] AC463 at 478-479; *Pontifical Society for the Propagation of the Faith v Scales* (1962) 17 CLR 9 at 19-20; *Hills v Chalk* [2009] Qd R 409; [2008] QCA 159 at [40] and [139]), making due allowance for current social conditions and standards (*Goodman v Windeyer* (1980) 144 CLR 490 at 502; *Andrew v Andrew* (2012) 81 NSWLR 656) and, generally consulting specific criteria set out in the particular legislation which empowers the Court to make a family provision order.

142 The discretionary nature of the Court's jurisdiction to make a family provision order, where it has determined that an applicant for relief has been left without adequate provision for his or her maintenance, education and advancement in life (or whatever may be the operative legislative criterion), offers opportunities for qualified success, or failure, not matched by an all-or-nothing challenge to the validity of a will on the ground of testamentary capacity.

A FIDUCIARY'S LIABILITY TO ACCOUNT: CONFLICTS OF DUTY AND INTEREST

143 There is no exhaustive definition of a "fiduciary". Nevertheless, a working definition (based on observations of Mason J in *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 96-97) focuses on a relationship in which one person ("the fiduciary") undertakes or agrees to act for, or on behalf of, or in the interests of another person (generally called "the principal" or "the beneficiary") in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense.

144 Each of a financial manager, a guardian and a legal personal representative occupies an office routinely regarded as fiduciary in character.

145 The duties of a fiduciary are generally described as the following (flowing from a duty of loyalty to act in the interests of the beneficiary and not otherwise):

(a) a duty not to place himself, herself or itself in a position of conflict between his, her or its duty to the person in need of protection and his, her or its own interests ("the no conflict rule"); and

(b) a duty not to obtain, or retain, a profit or benefit from the fiduciary office ("the no profit rule"),

without obtaining the fully informed consent of the beneficiary to whom fiduciary obligations are owed: *Chan v Zacharia* (1984) 154 CLR 178 at 198-199; *Maguire v Makaronis* (1997) 188 CLR 449 at 466-467.

146 *Prima facie*, a person incapable of managing his or her affairs might reasonably be thought to be incapable of giving his or her fully informed consent to a transaction otherwise in breach of fiduciary obligations.

147 A fiduciary may be described as an "accounting party" because liable to account to the beneficiary for unauthorised profits or benefits received within the scope of the fiduciary relationship.

148 A duty to account arises whenever a person obtains or deals with property in circumstances where the entitlement to do so is qualified (or conditioned) by a requirement that the person is not free to advance his or her own self interest but is required to act in the interests of another: JA Watson, *The Duty to Account: Development and Principles* (Federation Press, 2016), paragraph [456].

149 Dealing with incapacity in a family with a member increasingly vulnerable as he or she drifts into incapacity can be profoundly difficult for reasons commonly associated with the following "problems".

150 First, there is the problem of *recognising, and acknowledging, incapacity* (a concept the meaning of which depends on the business to be performed): *Gibbons v Wright* (1954) 91 CLR 423 at 437-439 (general principles); *CJ v AKJ* [2015] NSWSC 298 at [27]-[43] (protective jurisdiction); *Banks v Goodfellow* (1870) LR 5 QB 549 at 564-565 (probate jurisdiction).

151 Secondly, there is the problem of *recognising the existence of conflicting interests within the family*. Not uncommonly, even professional advisers erroneously assume that no conflicts of interest arise, or need to be guarded against, in a family setting.

152 Thirdly, even if the existence of conflicting interests within the family is recognised, there is the problem of *constructing a regime of management* which ensures that: (a) conflicts of interest are eliminated, or at least minimised; and (b) due performance of duties owed to the incapable person remains paramount: *IR v AR* [2015] NSWSC 1187 at [29]-[35].

153 Because the offices of financial manager and guardian are fiduciary in character, the holder of such an office is duty-bound (in positive terms) to serve only the protective purpose for which he, she or it was appointed to the office, and (expressed proscriptively) not to allow collateral purposes or personal interests to intrude upon the performance of that primary duty.

154 In considering whether to appoint to such a fiduciary office a member of the family, a carer or an associate of the person in need of protection, a court or tribunal exercising protective jurisdiction must be satisfied that the prospective appointee, above any consideration of self-interest, can be relied upon to perform the duties of the office. If that element of reliability is absent so too is suitability for appointment.

155 Fourthly, there is the problem of *accounting* for the estate of an incapable person who lives in community with those in whose care he or she resides (necessitating a relaxation of "the no profit" rule for the purpose of serving the interests of the incapable person): *Countess of Bective v Federal Commissioner of Taxation* (1932) 47 CLR 416 at 420-423; *Clay v Clay* (2001) 202 CLR 410 at 428-430 and 432-433; *Crossingham v Crossingham* [2012] NSWSC 95; *Woodward v Woodward* [2015] NSWSC 1793; *Downie v Langham* [2017] NSWSC 113; *Smith v Smith* [2017] NSWSC 408.

156 Fifthly, there is the related problem of how to account for an estate where a fiduciary has mixed his, her or its property with that of a beneficiary and/or failed to keep records sufficient to allow a proper audit: *Smith v Smith* [2017] NSWSC 408 at [447]-[451].

157 Sixthly, there is the problem of working out *whether a "family" transaction involves the exercise the powers of a fiduciary office* (such as those of an enduring attorney) or not. Even if not exercised, a power of attorney might, in combination with other evidence, evidence a special relationship of influence capable of supporting fiduciary obligation. A person occupying a special

relationship of influence might unconscionably obtain benefits at the expense of a vulnerable person (eg, by accessing bank deposits) by inducing the vulnerable person to confer benefits without deployment of a power of attorney.

158 Seventhly, there is the problem of defining the respective rights and obligations of co-owners of property (particularly, in equity) where one co-owner lacks capacity for self-management and another has assumed management of his or her affairs, with a fiduciary obligation to act in the interests of the incapacitated person: *Smith v Smith* [2017] NSWSC 408 at [296]-[325].

159 Eighthly, there is the problem of *whether a breach of fiduciary obligations might be excused* in the interests, and for the benefit, of an incapable person emotionally and socially dependent upon a defaulting fiduciary family member: *C v W (No 2)* NSWSC 945 at [45]-[47]; *Downie v Langham* [2017] NSWSC 113. A related problem might be whether an allowance should be made from the estate of the incapable person by way of *ex gratia* provision of maintenance for the defaulting family member: *Protective Commissioner v D* (2004) 60 NSWLR 513 at 540-542, 543 and 544-545.

160 Ninthly, there is often a latent problem of the *extent to which (if at all) testamentary intentions, or expectations, can or must be taken into account* upon an assessment of behaviour within a family, if not in shaping relief available from the court; including whether a family settlement might be approved by the Court (*W v H* [2014] NSWSC 1696).

161 Tenthly, there may be the problem of *expectations of remuneration* for the performance (by a fiduciary) of functions which, absent a grant of authority by a court, would be required to be performed gratuitously: *Ability One Financial Management Pty Ltd and Anor v JB by his tutor AB* [2014] NSWSC 245 and *Re Managed Estates Remuneration Orders* [2014] NSWSC 383 *(Remuneration of Protected Estate Manager); Re Estate Gowing* [2014] NSWSC 247; 11 ASTLR 128; 17 BPR 32, 763 and *Re Estate Ford* [2016] NSWSC 6 (Executor's Commission).

162 "Deregulation" or "privatisation" of protective management services – such as has been seen in recent decades – comes at a price in more than one dimension. Two examples come to mind. First, private managers increasingly seek remuneration for the performance of functions once performed by public institutions or family gratuitously. Secondly, absent close regulatory control, private managers have increasingly manifested a

predisposition to favour their own interests over duties of their office, even to the extent of misappropriation of property under their protection.

163 Each of these examples highlights the need for maintenance of *some* form of regulatory control over all managers (eg, through systems of registration, formal accounting requirements or audit procedures), *and* practical access to justice for those who seek a remedy for breach of fiduciary obligations.

164 "Who guards the guard?" is the perennial question.

CONCLUSION: OBJECTIVE PARAMETERS TO LOOK FOR

165 In protective, probate and family provision proceedings (including, but not limited to, one involving questions of incapacity) an initial, key step in any decision-making, problem-solving process involving property is generally to identify:

(a) the central personality (the deceased or a person at risk because of incapacity for self-management) through whose lens the world must be viewed.

(b) the nature and value of the "estate" (property) to which that key personality is, or may be, entitled.

(c) the existence or otherwise of any and all legal instruments that may govern, or affect, the disposition or management of such property: eg, a Will, the statutory rules governing an intestacy, an enduring power of attorney or an enduring guardianship appointment, a financial management order or a guardianship order.

(d) the full range of persons whose "interests" may be affected by any decisions to be made:

(i) probate litigation is "interest litigation" in the sense that, to commence or to be a party to proceedings relating to a particular estate, a person must be able to show that his or her rights will, or may, be affected by the outcome of the proceedings: *Nobaroni v Mariconte* [2018] HCA 36 at [16] and [49]; *Gertsch v Roberts* (1993) 35 NSWLR 631 at 634B-C; *The Public Trustee v Mullane* (Powell J, unreported, 12 June 1992) BC 9201821 at 4-5; *Bull v*

Fulton (1942) 66 CLR 295 at 337, citing *Bascombe v Harrison* (1849) 2 Rob Ecc 118 at 121-122; 163 ER 1262 at 1263-1264; *Estate Kouvakas* [2014] NSWSC 786 at [212].

(ii) protective litigation requires identification of "family" and "carers" who, *in the interests of the person in need of protection, ne*ed to be consulted: *Holt v Protective Commissioner* (1993) 31 NSWLR 227 at 239G-241C, 242B-C and 242E-243E; *Ex parte Whitbread in the Matter of Hinde, a Lunatic (*1816) 2 Mer 99; 35 ER 878, extracted in *W v H* [2014] NSWSC 1696 at [39]-[40].

(e) whether any (and, if so, what) steps need to be taken to preserve the estate under consideration.

(f) whether any (and, if so, what) steps need to be taken to ensure that all "interested persons" are notified of the proceedings or to confirm, or dispense with, service of notice of the proceedings on any person.

166 A sound working rule of practice generally is that (in management of any protective, probate or family provision case) prudence dictates that, as soon as may be practicable, all *property* potentially affected, and all "*interested persons*", should be given notice of the proceedings and an opportunity to intervene. The practical wisdom underlying *Osborne v Smith* (1960) 105 CLR 153 at 158-159 is not limited to probate litigation.

167 All "legitimate" interests should be consulted in prudential decision-making, difficult though it sometimes can be to judge what interests may be "legitimate". The concept of "legitimacy" upon an exercise of protective, probate or family provision jurisdiction is generally informed, if not governed, by the purpose served by an exercise of the particular jurisdiction. Ideally, a process of consultation not only aids prudential decision-making, but also binds in all persons affected by the decision to be made.

GCL

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